Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

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2018 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	))))))))	**WC Docket No. 18-349**

COMMENTS OF THE NATIONAL HISPANIC MEDIA COALITION, ASIAN AMERICANS ADVANCING JUSTICE-AAJC, THE INSTITUTE FOR INTELLECTUAL PROPERTY AND SOCIAL JUSTICE, PUBLIC KNOWLEDGE, UNITED CHURCH OF CHRIST, OFFICE OF COMMUNICATION INC., AND WASHINGTECH, LLC

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I. INTRODUCTION & SUMMARY

A Black superhero. A Cuban American family sitcom. A transwoman lead. On-screen television doctors and lawyers that look like us. From Hollywood to local news station managers, small steps have been taken towards developing on-screen characters and stories that reflect the diversity of America. When representation is accurate and meaningful, it does more than allow a demographic of Americans to self-identify with what is on screen; it tells real stories that bring "others" in from the margins and spark the beginnings of tolerance. It introduces compassion and understanding for differing cultures. However, these small steps are not enough. Diversity in media ownership and representation in the U.S. still has a long way to go.

In 1986, the National Hispanic Media Coalition ("NHMC") was established with a singular purpose—to promote diversity. Born of frustration that Latinos were denied fair representation in front of and behind the camera, NHMC has organized protests, collected petitions, filed public comments, and worked with policymakers to help ensure that the viewpoints reflected in radio, television, film, and print media are fair and inclusive. Yet, Latinos and other people of color are still systematically excluded from ownership and production opportunities in every segment of the media marketplace while they continue to be stereotyped and misrepresented. Instead of devoting resources to build on initiatives such as NHMC's Writers Program or NHMC's Scene Showcase, two programs designed to create media opportunities for Latino talent, NHMC has diverted resources to supplement Federal Communication Commission ("FCC" or "Commission") policies that have been ineffective as it relates to increasing diversity.

The FCC has a Congressional mandate to "promote...diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity" as defined in Section 257(b) of the Communications Act. Still, year after year, the number of minority broadcasters remains abysmally low at 2.6 percent of television stations and 5 percent of local radio stations,[1] which does not represent the nearly forty percent of the U.S. population made up of people of color.[2]

The Commission has a dark past of codifying discrimination into policies that deliberately excluded people of color. Until the late 1950s, the FCC operated as a gatekeeper of communications, exacerbating segregation and inequality by withholding licenses from minorities. By 1956, when the horrors of Jim Crow laws--captured on film, in radio broadcasts, and in print--became impossible to ignore, the Commission finally granted its first license to a minority broadcaster.[3] Still, the FCC was complacent in other discrimination tactics and continued to allow segregationists to obtain broadcast licenses and flourish.[4] By refusing to hold broadcasters accountable for prejudicial conduct, the Commission provided cover for television and radio stations to continue routine discriminatory practices, like not hiring people of color.[5] And because there were no jobs in broadcasting for graduates of color, minority-serving institutions and universities missed opportunities to establish broadcast study programs, thus, helping the cycle of discrimination to take root and cripple the prospect of improving pipelines to that would increase media diversity.

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[1] Third Report of Commercial Broadcast Stations, FCC Form 323 Ownership Data as of October 1, 2015, FCC (2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344821A1.pdf.
[2] *See* Quick Facts, United States, U.S. CENSUS BUREAU (2017), https://www.census.gov/quickfacts/fact/table/US/PST045217.
[3] A. Bush and M. Martin, in "The FCC's Minority Ownership Policies from Broadcasting to PCS," 48 Federal Comm. Law Journal 423, 439 (1996), *available at* http://www.fclj.org/wp-content/uploads/1995/01/bush.pdf ("Bush and Martin").
[4] Comments of the Civil Rights Organizations, Docket No. 99-25 (filed Aug. 2, 1999), https://www.fcc.gov/ecfs/filing/5004307764 ("Civil Rights Orgs").
[5] *Id.* at p. 41.

Notably, in a 1955 decision over a license dispute, the Commission deliberately sided with a known segregationist over his competitor, Shreveport Television, who was the first known broadcast license applicant to include Black shareholders.[6] Instead of fulfilling its statutory mandate to protect mass communications for *all* Americans, the Commission dismissed claims of discrimination by citing a Louisiana State Law that did not allow Black people to sit in the lower level of a movie theater to a TV Studio audience.[7]

Throughout the Civil Rights Movement, the FCC's actions and inactions supported and helped amplify segregation and discrimination, traces of which can still be detected in the media marketplace today. For instance, in 1963, the FCC threatened to revoke the license of an AM radio station after the local city government filed a complaint alleging the station's "Black oriented" programming would lead to an influx of Black residents in the station's neighborhood.[8] In 1965, the Commission turned a blind eye to a complaint lodged by the Federal Bureau of Investigation flagging a station's call and riot incitement of the crowd gathered to prevent James Meredith from attempting to enroll at the University of Mississippi for the fourth time.[9] In a similar case, the FCC attempted to use inaction again to avoid addressing discriminatory actions in Mississippi TV broadcasting.[10] Yet, on remand by the D.C. Circuit Court the following year,[11] the FCC renewed the TV station's license. Eventually, the D.C. Circuit ordered the Commission

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[6] *Id.* at p. 43.

[7] Southland Television Co., 10 RR 699, recop. denied, 20 FCC 159 (1955) ("Southland").

[8] *Broward County Broadcasting*, 1 RR2d 294 (1963).

[9] *Columbus Broadcasting Company*, Inc., 40 FCC 641 (1965) (concluding the station's incitement of the riot was an isolated incident).

[10] *Office of Communication of the United Church of Christ*, 359 F.2d 994 (D.C. Cir. 1966).

[11] *Office of Communication of the United Church of Christ*, 425 F.2d 543, 550 (D.C. Cir. 1969); *see also* Bush and Martin at 439-40 n. 94 (noting that evidence in the record showed that the FCC was aware that the licensee had "engaged in a variety of discriminatory programming activities, including the refusal to permit the broadcasting of any viewpoints contrary to the station's own segregationist ideology").

to deny the TV station's license in an effort to remedy the Commission's wrongs that were beyond repair.[12]

Finally, in 1969, the Commission voted to bar discrimination in hiring and imposed a new requirement for licensees to recruit minority employees. However, as MMTC argued in 1999, "[o]nly fourteen stations ever went to hearing on allegations of discrimination, and not one ever lost a license for race or gender discrimination."[13] Fifty years later, the numbers do not lie: broadcast ownership by minorities is still unacceptable and, in some cases, may be getting worse.[14]

After decades of being shut out of or denied media ownership and programming opportunities, people of color still do not have adequate representation in the media marketplace. Working to increase media diversity continues to be at the core of NHMC's mission and creating more opportunities for people of color to own media outlets and produce diverse content remain among its primary objectives. Thus, when the FCC eliminates policies that promote media diversity or fails to develop policies to that end, it thwarts NHMC's purpose.

There is a momentous opportunity before this Commission to reverse its course, begin to make amends for past harms, and finally choose the right side of history. As Chairman Pai has stated, "Every American should have the opportunity to participate in the communications marketplace.[15]" The Commission has an obligation to enhance efforts to increase minority

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[12] *Id*.

[13] Civil Rights Orgs at p. 48, (citing Comments of Civil Rights Organizations in MM Docket Nos. 96-16 and 98-204 (Broadcast and Cable EEO), filed March 5, 1999, at 114-116)).

[14] *See* David Honig, *How The FCC Suppressed Minority Broadcast Ownership and How the FCC Can Undo the Damage It Caused*, Southern Journal of Policy and Justice, Vol. XII, *available at* https://www.benton.org/sites/default/files/HonigFCCMinorityOwnership.pdf.

[15] Jacob Kastrenakes, *FCC wants help promoting diversity in the communications industry* (Apr. 24, 2017), https://www.theverge.com/2017/4/24/15407846/fcc-diversity-committee-announced.

ownership and representation in the market and should abandon deregulatory plans which promise to further homogenize broadcast ownership.

II. THE COMMISSION HAS A STATUTORY OBLIGATION TO ENSURE THAT ALL AMERICANS HAVE ACCESS TO ESSENTIAL COMMUNICATIONS.

Ensuring that communications services are affordable and accessible to all Americans is at the core of the FCC's statutory mandate. Section 1 of the Communications Act mandates the Commission to make communications services available "to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex…"[16] Under Section 254 of the Telecommunications Act of 1996, the Commission also has an obligation to ensure that all Americans, "including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information service."[17] Broadcast programming continues to qualify as one of the essential communications services because it is free and provides access to essential news and information.

Local news is a critical resource for communities of color and other marginalized communities that over index on broadcast television over their white counterparts.[18] The Commission has a mandate to ensure that those services continue to be accessible for *all* Americans, including communities of color.

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[16] 47 USC §151.
[17] 47 USC §254(b)(3).
[18] *See* Katerina Eva Matsa, *Fewer Americans Rely on TV news; what type they watch varies by who they are*, Pew Research Center (Jan. 5, 2018), http://www.pewresearch.org/fact-tank/2018/01/05/fewer-americans-rely-on-tv-news-what-type-they-watch-varies-by-who-they-are/.

A. Online Streaming Services Are Not an Accurate Substitute for Free TV and Radio Broadcasts.

i. Communities of Color Still Rely on the Free Nature of Broadcast Services.

The free nature of radio and local television broadcasting continues to make the service a relevant utility for communities of color. This is especially true for families who are low income and/or are on the wrong side of the digital divide. For Americans who are focused on keeping food on the table and making ends meet, free broadcast programming is often the only programming that they can afford to receive. In particular, "Hispanics continue to rely disproportionately on the free and local TV and radio that local broadcasters provide. "[19] According to Nielsen, "[a]mong Hispanic audiences, 20% rely on over the air television, and 16% of African American audiences rely on over the air television."[20] Low-income households earning less than $30,000 are also unlikely to have alternatives.[21] Even though various technologies have increased access to news and information, large populations of the U.S. continue to rely solely on free, local broadcasts. In fact, a recent Pew Research study found that television remains the preferred mode of news consumption over print, the internet or radio.[22]

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[19] *Broadcast Television and Radio in Hispanic Communities*, NAB, at 1, http://www.nab.org/mpres/broadcasttvandradio-hispaniccommunities_nab.pdf ("NAB Report").
[20] *See* Americans for Tax Reform et al., *Letter to Chairman Pay* (June 21, 2018), https://ecfsapi.fcc.gov/file/106222242601905/Coalition%20ltr%20Media%20Modernization%20062118.pdf.
[21] See Katerina Eva Matsa, Fewer Americans Rely on TV news; what type they watch varies by who they are, Pew Research Center (Jan. 5, 2018), http://www.pewresearch.org/fact-tank/2018/01/05/fewer-americans-rely-on-tv-news-what-type-they-watch-varies-by-who-they-are/.
[22] *See* Amy Mitchell, Americans Still Prefer Watching to Reading the News-- and Mostly Still Through Television, Pew Research Center (Dec. 3, 2018), https://www.journalism.org/2018/12/03/americans-still-prefer-watching-to-reading-the-news-and-mostly-still-through-television/.

For Americans who rely on local news, 76 percent consume news through free TV broadcasting.[23] This means that a significant population of Latinos and other communities of color depend on free, local broadcasts to stay up to date on local news, disaster alerts, and other educational programming.

Further, "[m]any high-density Hispanic Designated Market Areas (DMAs) depend exclusively on over-the-air broadcasting, dramatically outpacing other population groups' reliance on broadcast-only television."[24] For example, "one-third of Hispanic homes in Dallas rely exclusively on broadcast-only TV, yet less than one-fifth of total market homes are broadcast-only."[25] Thus, the Latino community, as a whole, uniquely relies on free broadcast services to be informed about the happenings of their localities, "and broadcasting continues to provide a vital and irreplaceable resource."[26] Free broadcast services provide the Latino community with news, life-saving emergency information, tools for civic engagement, and educational programming for learners both young and old.

ii. The High Cost of Broadband Services Keeps Communities of Color Disconnected from the Benefits of Online Programming.

Despite its growing popularity and prominence, online media remains inaccessible for many communities of color. Over half of Latinos do not have access to the internet at home in

[23] For Local News, Americans Embrace Digital but Still Want Strong Community Connection, Pew Research Center, at p. 15 (Mar. 26, 2019), https://www.journalism.org/2019/03/26/for-local-news-americans-embrace-digital-but-still-want-strong-community-connection/.
[24] NAB Report at 2.
[25] *Id*.
[26] *Id*. at 1.

the U.S.[27] Approximately 22 percent of Latinos are limited to internet access via smartphone[28] and are thus limited by data cap restraints. They are also among the most likely to cancel a mobile subscription due to financial hardship.[29] These realities only contribute to the digital divide. Financial restraints can easily keep communities of color offline and out of touch with online streaming services for local news and other programming. Affordability and other barriers to connectivity reiterate the utility and necessity for free broadcast services.

iii. Free Broadcast Programming is Still Essential for American Children.

Broadcast television remains uniquely pervasive and accessible to children among all forms of media, and it is available to all American households.[30] More than 43 percent of children under the age of two watch TV at least once a day, and 74 percent of all infants and toddlers have watched TV before the age of two.[31] The Commission proposes that the shift in the media landscape towards cable, video-on-demand, and Over-the-Top ("OTT") services may

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[27] *See Internet/ Broadband Fact Sheet*, Pew Research Center (Feb. 18, 2018), http://www.pewinternet.org/fact-sheet/internet-broadband/; *see also* Marguerite Reardon, *FCC Chairman Promises Broadband for All*, Cnet, Mar. 15, 2017, https://www.cnet.com/news/fcc-chairman-ajit-pai-promises-broadband-for-all/ (quoting Chairman Pai, "Access to digital opportunity shouldn't depend on who you are or where you're from," he said. "Whether you live in Manhattan, New York, or Manhattan, Montana (population 1,520), we want you to be digitally empowered").

[28] Andrew Perrin, *Smartphones help blacks, Hispanics bridge some – but not all – digital gaps with whites* (Aug. 31, 2017), https://www.pewresearch.org/fact-tank/2017/08/31/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/.

[29] *See* Aaron Smith, Smartphone Use in 2015, Apr. 1, 2005, http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/.

[30] *See* Children's Television Programming Rules Modernization of Media Regulation Initiative, Notice of Proposed Rulemaking, GN Docket Nos.18-202, 17-105, at paras. 9-10 (adopted July 12, 2018), https://docs.fcc.gov/public/attachments/FCC-18-93A1.pdf ("Kid Vid NPRM"); *FCC v. Pacifica Found.*, 438 U.S. 726, 728 (1978).

[31] *TV and Children Under Age 3*, PBS Parents, http://www.pbs.org/parents/childrenandmedia/article-faq.html#prevalentTV.

negate the need for strenuous media ownership rules.[32] That analysis is based on the assumption that all American children have access to these services, but the data proves otherwise.

By the Commission's own estimate, "nearly 30 million Americans cannot reap the benefits of the digital age."[33] Families on the wrong side of the digital divide still rely on free, local broadcasts for news and informational programming.[34] Importantly, the Commission has a responsibility to foster a diverse media landscape with robust broadcast programming for all children, regardless of their family's ability to pay more for alternatives.

III. THE COMMISSION SHOULD PURSUE POLICIES THAT ENCOURAGE DIVERSE MEDIA OWNERSHIP AND ADDRESS THE ROOT CAUSE OF LOW DIVERSITY OWNERSHIP INSTEAD OF A BAND-AID SOLUTION.

A. The Commission Should Abandon its Tradeable Diversity Credits Proposal.

NHMC urges the Commission to abandon its proposed "Tradeable Diversity Credits" Model. In the NPRM, the Commission proposes a system of diversity credits "that could be traded in a market-based system and redeemed by a station buyer to offset increased

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[32] 2018 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, GN Docket No. 18-349, at para. 2 (adopted Dec. 12, 2018) ("Quadrennial Review NPRM)"; Kid Vid *NPRM* at paras.1-2; *but see Nielsen Total Audience Report Q1 2018*, Nielsen, at 19, https://www.nielsen.com/us/en/insights/reports/2018/q1-2018-total-audience-report.html ("*Nielsen Report*") (noting children ages 2-11 only watch 15% of their television content by streaming); NHMC Kid Vid Comments, GN Docket Nos.18-202, 17-105, at 7 (fil. Sept. 12, 2018) ("NHMC Kid Vid Comments").
[33] FCC, *Bridging the Digital Divide*, https://www.fcc.gov/about-fcc/fcc-initiatives/bridging-digital-divide-all-americans (last visited Sept. 23, 2018).
[34] *See* Americans for Tax Reform et al., *Letter to Chairman Pai* (June 21, 2018), https://ecfsapi.fcc.gov/file/106222242601905/Coalition%20ltr%20Media%20Modernization%20062118.pdf) (finding that approximately 0.5% of households with children do not have internet or cable); *see also* Statista, *Number of TV Households in the United States* (last visited Sept. 20, 2018), https://www.statista.com/statistics/243789/number-of-tv-households-in-the-us/ (finding 119.6 million TV households in the 2017-2018 season)." NHMC Kid Vid Comments at 7-8.

concentration that would result from a proposed transaction."[35] The FCC previously developed this idea of a Tradeable Diversity Credits in 2004, and suggested that the credits "be linked to broadcast licenses."[36] In 2004, the Commission's vision was to attach a certain number of diversity credits to a broadcast license "commensurate with the extent to which the licensee of the station is considered to be socially and economically disadvantaged."[37] Meaning, the proposal aimed to allow owners of licenses to circumvent media consolidation rules by qualifying as "socially or economically disadvantaged." [38] However, the Commission did not specify or dictate tangible measurements or guides for what would qualify a buyer as disadvantaged or how many credits should be awarded to license holders who do qualify.

The Commission's Diversity Credit proposal is incomplete in its nature and is misguided in associating a system of diversity with property. The Commission blankly described its Diversity Credits within its proposal "to be used as a form of currency."[39] Not only is this description a perfect snapshot of how mistaken this proposal is, it's also incredibly out of touch. Treating people of color or their contributions as currency is, at its core, a dehumanization tactic. Instead of encouraging competition and empowering a new generation of diverse broadcast owners by increasing access to capital and licenses, the Commission is proposing a small carve out that, in the long run, would create bigger barriers for market entry.

Treating people of color as bargaining chips in market share transactions will not create an increase in diverse ownership. Rather, it will encourage license owners (who as we know are

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[35] Quadrennial Review NPRM at para. 99.
[36] *Id*. at para. 100.
[37] *Id*. (quoting Proposal on Diversity Credits, dated May 22, 2004 (drafted by David Honig as a member of the Transactional Transparency Subcommittee of the FCC Advisory Committee on Diversity in the Digital Age)).
[38] Quadrennial Review *NPRM* at para. 100.
[39] *Id*. at para. 107.

predominantly not members of marginalized communities) to use superficial definitions to check a "diversity box." The credits earned from that box will, in turn, be used to acquire a larger market share, increase consolidation, and boost profit margins. The Commission's past discrimination should not spill over into the present.

B. The Commission Should Consider Revamping the Minority Tax Certificate.

The Commission should develop a record to support a program that actually encourages diversity *ownership*, not just participation, like a revised Minority Tax Certificate. The original Minority Tax Certificate (MTC) was created by the Commission in 1978 to increase and encourage ownership of broadcast or cable property by people of color and women.[40] The MTC awarded a tax break to any person who sold their broadcast entity to a minority purchaser or when an investor who contributed to the startup capital of a minority-operated broadcast or cable entity sold their interest in the entity. Before its abrupt repeal by Congress in 1995, the MTC made a significant difference in media ownership: minority purchasers acquired 288 radio stations, 43 television stations, and 31 cable systems.[41] In just under 20 years, the MTC more than doubled minority broadcast ownership and was "proven to be a significantly successful tool in reducing obstacles to minority ownership in the communications industry."[42] The Commission should document the mechanism and rationales support the MTC in this docket to undergird Congressional efforts to return to the Commission authority for the MTC.

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[40] *See* Krasnow, Erin G. and Fowlkes, Lisa M., *The FCC's Minority Tax Certificate Program*: *A Proposal for Life After Death*, 51 Fed. Comm. L.J. 666, 668 (1999), *available at* http://www.repository.law.indiana.edu/fclj/vol51/iss3/8 ("Krasnow").
[41] *Id*. at 670.
[42] *Id.* at 671.

C. Any Revival of the Minority Tax Certificate Should Specifically Address Both Facets of the Media Ownership Diversity Problem: Capital and Access.

Reviving the MTC would uproot a variety of problems, including navigating the program through Constitutional and race-neutrality tests and new tax laws that have been established since the repeal of the MTC. Changes, revamps, and improvements to the MTC are unavoidable and necessary. One alternative program proposal, called the Disadvantaged Media Owner Tax Certificate, would focus on economically disadvantaged purchasers, and would address the two-pronged problem of minority ownership in media: access to licenses *and* access to capital.[43] Addressing both sides of the problem of media ownership diversity is critical, and is precisely what the FCC's current proposal is lacking. Without a dual-sided solution, efforts to increase diverse ownership in broadcasting will be incomplete and positioned to fail.

IV. THE COMMISSION'S BROADCAST OWNERSHIP RULES ARE ONLY A STARTING POINT.

A. The Commission Should Strengthen Efforts to Diversify Media Ownership and Content.

Diverse ownership means diverse and inclusive programming unique to each local community. According to a study by El Rey Network, diversity has a trickle-down effect in the

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[43] Daiquiri Ryan, The Disadvantaged Media Owner Tax Certificate: *Bringing the Minority Tax Certificate Back from the Dead*, George Washington Law School (unpublished). The Disadvantaged Media Owner Tax Certificate (DMOTC) is an updated iteration of the late Minority Tax Certificate modified to constitutionally address the two largest barriers to media ownership: access to licenses and access to capital. The proposed DMOTC model would operate in two ways: a person selling their media property could earn a tax break by either selling their media property to a person who qualifies as a disadvantaged buyer (this would include, but is not limited to persons of color, females, persons with a disability, or persons who can show they have an economically disadvantaged background) or by paying a portion of their proceeds from the sale of their media property to a non-qualifying buyer into an investment fund that provides low-interest loans to disadvantaged buyers. It is important to note that in order to develop the DMOTC, Congress would need to legislate a proposal to the FCC.

television industry: diverse production deals lead to diverse show runners, leads to diverse writers, leads to diverse content and representation on screen.[44] The El Rey Diversity Report analyzed the presence of people of color on the television screen during the 2013-2014 season, and found that 69 percent of shows did not feature a single Latino cast member, 44 percent did not feature an African American cast member, and 89 percent did not feature an Asian American cast member. [45] Overall, "[d]uring the 2013-2014 TV Season, 68% of Broadcast and Cable Scripted Shows featured casts that were more than 70% White."[46] Further, "[n]early half, 42% had casts that were more than 80% White."[47] These low numbers directly coincide with the low number of media outlets owned by people of color or members of other marginalized groups.

While services like Netflix, Hulu, and other Over the Top (OTT) content creators have begun to bypass traditional gatekeepers and disrupt the entertainment space with diverse casts (like Netflix's One Day at a Time) television, film, and Hollywood still remain disproportionately White. Diverse and accurate representation in broadcasting (and beyond) is crucial for communities of color and other marginalized communities. As the statistics show, representation on screen translates to tangible, real-life representation across educational institutions, industries, and politics.

B. The Commission Should Enhance, Not Weaken or Eliminate, Media Ownership Rules.

The quadrennial review is not simply about eliminating or relaxing rules. Rather, its purpose is to determine whether the current rules adequately serve the public interest. Therefore,

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[44] *State of Diversity in Media & Entertainment*, El Rey Network, Vol. 1, at 25 (rel. Dec. 1, 2016), file:///Users/DaiquiriRyan/Downloads/El%20Rey%20Diversity%20Report%202016.pdf (El Rey Study).
[45] El Rey Study at 25.
[46] *Id*.
[47] *Id*.

when the Commission decides whether to keep, repeal, or modify current rules, some rules may need to be enhanced. In this year's NPRM, the Commission singles out three rules to review and seeks comment on whether these rules continue to be necessary in the public interest or whether they should be modified or eliminated. But this question is far too narrow and does not comply with the statute.[48] In order to modernize ownership limits to address today's unprecedented levels of concentration, new enhanced rules are needed, including rules designed to break up the rise in cross-ownership of video service providers, broadband providers, and online information services.

Courts have rejected the interpretation that Section 202(h) of the Communications Act is purely deregulatory. In *Prometheus Radio Project*,[49] public interest groups challenged the Commission's then deregulatory method of conducting quadrennial reviews.[50] The Third Circuit looked at the Commission's approach and expressly rejected the Commission's application of a "presumption in favor of deregulation."[51] The court explained that when the Commission determines which rules are "necessary for public interest," the term "necessary" is to mean "convenient," "useful," or "helpful," and not "essential" or "indispensable."[52] This less stringent standard shows that the quadrennial review is not only about repealing or modifying existing media ownership rules, but also about updating and improving them to reflect market realities.

Upon each review, in order to determine whether a certain rule serves the public interest, the Commission should ask whether the rule must be repealed, modified, or whether additional

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[48] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h).
[49] 373 F.3d 372 (3d Cir. 2004).
[50] *Id.* at 395.
[51] *Id.* at 423; *see also* Andrew Jay Schwartzman, Harold Feld & Parul Desai, *Section 202(h) of the Telecommunications Act of 1996: Beware of Intended Consequences*, 58 Fed. Comm. L.J. 581, (2006).
[52] 373 F.3d at 394.

new rules are necessary in light of changes in the marketplace.[53] Additionally, before the Commission moves forward with any elimination of a rule, it should conduct a study and gather unbiased data to support its proposal. Both the Commission and Congress have stressed that the Commission's role is to preserve existing competition as well as promote access to diverse and competing sources of news and opinions. As explained by the Supreme Court: "Federal policy, however, has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation."[54]

Cross-ownership amplifies power far more than simple aggregate figures suggest and limiting cross-ownership provides a much greater likelihood of individuals in different demographics receiving information from diverse and unaffiliated sources. In fact, research by Harvard professor Yochai Benkler shows how media ownership rules have real consequences on behavior—finding that conservative media outlets have much more polarizing effects than do internet platforms, and that Fox News in particular is a source of widespread conspiracy theories.[55] Unquestionably, broadcast media greatly influences consumers. Media ownership rules must help ensure that networks remain diverse rather than becoming endless echo chambers with unchecked power. The Commission has statutory authority to enhance media

[53] Harold Feld & Lindsay Stern, *The FCC Can—and Should—Updated Its Rules to Combat Rising Cross-Ownership*, Feb. 25, 2019, https://www.publicknowledge.org/news-blog/blogs/the-fcc-can-and-should-update-its-rules-to-combat-rising-cross-ownership.
[54] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 193 (1997).
[55] Henry Farrell, *Blame Fox, not Facebook*, WASH. POST, Nov. 6, 2018, https://www.washingtonpost.com/news/monkey-cage/wp/2018/11/06/blame-fox-not-facebook-for-fake-news/?utm_term=.a1aeb713a65c (last visited April 18, 2019).

ownership rules and limit how much a company with "licensed facilities" may own.[56] According to the statute, "[t]he Commission may prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications . . ."[57] This includes the authority to limit the ownership of broadcasters, cable operators, Title II telecommunications providers,[58] mobile services,[59] as well as any information service, including any online content or streaming service. Because the Communications Act broadly defines media of mass communication and gives the Commission authority to control it, the Commission can and should put limits on cross-ownership. Cross-ownership rules that limit broadcast licenses and combat unrestrained consolidation ultimately helps competition, localism, and diversity—the main goals of the quadrennial review.

V. CONCLUSION

The Commission does not only have a statutory obligation to ensure that media ownership is diverse and competitive, it has touted the importance of increasing opportunities for minorities. NHMC and the undersigned civil rights advocates urge the Commission to recommit to promoting media diversity and abandon proposals that could further homogenize the market. It is imperative for a healthy democracy and equal representation that media ownership reflects the diverse makeup of the American population.

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[56] 47 U.S.C. § 533(c) (stating "The Commission may prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications . . .").

[57] 47 U.S.C. § 309(i)(3)(C)(i) (explaining that "media of mass communication" includes "television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or *other information services* . . ." (emphasis added)).

[58] 47 U.S.C. § 214.

[59] Licensed under 47 U.S.C. §§ 301, 303, 309.